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SUPREME COURT, U.S.

No. 07-907

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH W. JOHNSON,
Petitioner,

v.

JESSE GADSON, et al.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the
District of Columbia Circuit

PETITION FOR REHEARING PURSUANT TO SUPREME COURT RULE 44.1

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Questions Presented for Review

Plaintiff signed a long term 10-year lease with the landlord of the building that housed Plaintiff's business. The DCMPD investigated and persecuted Plaintiff for the sole purpose of closing down Plaintiff's establishment and depriving him of his tenancy. This, despite the fact that Plaintiff did nothing wrong and was completely and utterly vindicated in a trial before Superior Court.

1) Whether it is a violation of an individual's rights to equal protection of law and to justice under law to arrest him without probable cause, prosecute him without probable cause, close his business down without probable cause, deprive him of his livelihood without probable cause, and after he is acquitted of all charges and utterly vindicated of all wrong doing in a court of law, refuse him legal representation for the recovery of his livelihood and commercial real property, simply and exclusively, because he is a White man of mixed racial ancestry?

2) Whether refusing Johnson legal services, because of an invidious discriminatory racial animus violates TITLE 42 U.S.C. § 1981?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States District Court for the District of Columbia and United States Court of Appeals for the District of Columbia Circuit.

The Petitioner here and Plaintiff – Appellant below is Kenneth W. Johnson.

The Respondents here and Defendants – Appellees below are Jesse Gadson, Tony S. Lee, Herbert N. Harmon, Robert F. Condon, Elbert Shore, McGuireWoods LLP.

CORPORATE DISCLOSURE STATEMENT

Kenneth W. Johnson is a person, an individual, a human being, and therefore, is not a corporation. There is no parent or publicly held company owning 10% or more of any corporate stock, a statement to this effect shall be included on this page. Supreme Court Rule 29.6.

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JURISDICTIONAL STATEMENT

On December 26th 2007, Johnson filed a Petition for a Writ of Certiorari that sought review of [t]he October 9th 2007 JUDGMENT of the United States Court of Appeals for the District of Columbia Circuit pursuant to TITLE 28 U.S.C. § 1254.

RELEVANT STATUTES IN THE CASE

42 U.S.C. § 1981 is accurately reproduced on page 2 of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

On January 9th 2006, Johnson filed a Complaint that contained [4] Counts, in the United States District Court for the District of Columbia.

On May 30, 2006, the district court granted Petitioner's motion for leave to amend his Complaint to add McGuireWoods LLP as an additional defendant. On June 9th 2006, Johnson filed a 106-page Amended Complaint that contained [3] Counts: COUNT 1 "LEGAL MALPRACTICE", COUNT 2 "TITLE 42 U.S.C. § 1983 "CUSTOM"", COUNT 3 "TITLE 42 U.S.C. § 1981". The 4th Count in the Original Complaint was not in the Amended Complaint.

On July 10, 2006, McGuire Woods LLP and Tony Lee moved to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)6 for failure to state a claim on which relief could be granted.

Respondents Gadson, Harmon, Condon, and Shore, also filed similar motions.

By Order dated September 19, 2006, the district court granted the Rule 12(b)(6) motions to dismiss. The district court concluded that Petitioner failed to state any claims upon which relief could be granted.

STANDARD OF REVIEW

The function of a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)6 is to "test the sufficiency of the plaintiff's allegations," while a motion for summary judgment pursuant to Fed.R.Civ.Pro. 56 is to "test the sufficiency of the non-moving party's evidence in light of the legal theory it has advanced." *Covad Communs. Co. v. Bell Atlantic Corp.*, 398 F.3d 666, 676 (D.C. Cir. 2005).

In *Covad* Id. supra, the Court stated: "Alternatively, Bell Atlantic urges us to hold, as a matter of law, that its bringing the patent suit could not have harmed competition. In so doing, Bell Atlantic confuses the function of a motion to dismiss pursuant to Rule 12(b)6, which tests the sufficiency of the plaintiff's allegations, with a motion for summary judgment pursuant to Rule 56, which tests the sufficiency of the non-moving party's evidence in light of the legal theory it has advanced. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) ("simplified notice pleading standard [of the Federal Rules of Civil Procedure] relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims").

ARGUMENT

I. Johnson states that the record does not amply reveal that Johnson's claims against the District of Columbia were time barred or without merit. Johnson's claims had merit, and Johnson's claims were not time-barred. The previously filed "Reply Brief" addresses the "time-barred" issue.

The Brief in Opposition For Respondents Tony S. Lee and McGuireWoods LLP states: "The record amply reveals that Respondents refused to represent him because his claims against the District of Columbia stemming from his 1997 arrest were either without merit, or time-barred. Thus, this Court should deny him a writ of certiorari."

The United States Court of Appeals for the Fourth Circuit held: "To establish a prima facie case of unlawful racial discrimination relating to the purchase of goods or services under 42 U.S.C. § 1981, the plaintiff must establish that: (1) he is a member of a protected class; (2) he sought to enter into a contractual relationship with the defendant; (3) he met the defendant's ordinary requirements to pay for and to receive goods or services ordinarily provided by the defendant to other similarly situated customers; and (4) he was denied the opportunity to contract for goods or services that w[ere] otherwise afforded to white customers."—*Williams v. Staples, Inc.* 372 F.3d 662, 667.

To establish a prima facie case of unlawful racial discrimination relating to the purchase of goods or services under 42 U.S.C. § 1981, within the context of the instant case, Johnson v. Gadson et. al., the plaintiff must establish that: 1) Johnson is a White man of mixed racial ancestry whose physical appearance is either White/European or predominately White/European; (2) Johnson sought to enter into a contractual relationship with the defendant(s); (3) Johnson met the defendant's ordinary requirements to pay for and to receive goods or services ordinarily provided by the defendants to other similarly situated customers; (4) and Johnson was denied or refused the goods or services that w[ere] otherwise afforded to nonwhite customers. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273. Johnson's Amended Complaint maintains that he is an American of European heritage, and is White.

The pleading that Respondent Tony S. Lee drafted and e-mailed to Johnson for filing in the U.S. District Court states:

> "Section 12-301(1) provides that an action for the recovery of tenements must be filed within 15 years of accrual of the cause of action. It is obvious that Plaintiff cannot recover his lost tenement from Defendants because his business has been irrevocably ruined, and Defendants do not have the ability to grant him a new lease even if ordered by the Court. However, what Plaintiff does seek is recovery of the value of the lost tenement caused by

> Defendants' action. Although this is a case of first impression for the Court as a search for relevant case law failed to reveal any cases directly on point, this is similar to the situation where a plaintiff sues for the recovery of property, but cannot do so because it has been destroyed. Such plaintiff cannot recover the actual property, but the plaintiff can recover the value of the converted property. The 15-year limitations period in § 12-301(1) is most appropriate for this case given that the DCMPD's actions were purposefully directed towards closing down Plaintiff's business and depriving him of his tenement, and therefore, Plaintiff's complaint is not barred by the applicable statute of limitations because this action is filed well within the 15 year time period."

The United States Court of Appeals for the District of Columbia Circuit's April 7, 2004 ORDER states in pertinent part: "The district court properly dismissed appellant's claims as barred by the statutes of limitations and correctly determined that the 15-year limitations period for actions "for the recovery of lands, tenements, or hereditaments," D.C. Code § 12-301(1), does not apply. Appellant has conceded that he "cannot recover his lost tenement" and has provided no basis for tolling the statute of limitations."

2001 Edition D.C. Code § 12—301. Limitation of time for bringing actions. "Except as otherwise specifically provided by law, actions for

the following purpose may not be brought after the expiration of the period specified below from the time the right to maintain the actions accrues: (1) for the recovery of lands, tenements, or hereditaments—15 years; (2) for the recovery of personal property or damages for its unlawful detention—3 years; (3) for the recovery of damage for an injury to real or personal property—3 years."

Here Tony S. Lee is playing on Kenneth W. Johnson's ignorance of the law (as his lawyer) in order to "prevent" Johnson from benefitting from the 15-year statute of limitations for the recovery of lands, tenements, or hereditaments pursuant to D.C. Code § 12-301(1). This was a very insidious scheme: Tony S. Lee is not trying to help Kenneth W. Johnson; he's trying to hurt Johnson by putting language before the U.S. District Court and the U.S. Court of Appeals that Johnson "cannot recover his lost tenement" and "preventing" Johnson from benefitting from the 15-year statute of limitations. The Amended Complaint charges that Tony S. Lee engaged in intentional sabotage of Johnson's case, because Johnson is a White man of mixed racial ancestry.

The Superior Court for the District of Columbia's January 12, 2004 Order in *Johnson v. District of Columbia*, Civil Action 3837-98 states in pertinent part: "Where, as here, the plaintiff asks the court to vacate judgment due to fraud, he must show the following elements with respect to defendants' behavior: (1) a false representation, (2) in reference to a material fact, (3) made with

knowledge of its falsity, (4) with the intent to deceive, and (5) action taken in reliance upon the representation. *Cobb v. Cobb*, 116 WLR 1993 (Super. Ct. 1988). Assuming the plaintiff proves all five of the above elements, the court may then set aside the earlier decree, even if the present case was filed well after the general year-long limitation." In *Cobb* Id. supra, the Court held:

> "There could be no serious question that the representations in these affidavits were material and that action was taken in reliance thereon by the Court. Thus, the critical issues are whether these representations were false, whether Mr. Cobb knew they were false, and whether he intended to deceive the Court. In evaluating these issues, the Court notes that the elements need not be proved by direct evidence, but may be established by reasonable inferences deducible from circumstantial evidence. See Standardized Civil Jury Instructions for the District of Columbia, No. 20-2 (1981)."—*Cobb v. Cobb*, 116 WLR 1993 (Super. Ct. 1988).

Attorney Tony S. Lee read the pleadings filed by the District of Columbia's attorney James A. DeVita, which state: "On May 21, 1998, plaintiff filed his complaint in the above-captioned matter alleging, inter alia, that he was subject to harassment by the District of Columbia Metropolitan Police Department. On May 22, 1998, plaintiff filed a virtually identical complaint in the case of Johnson v. O'Boyle C.A. 98-3875, in which

he also alleged that he was the victim of police harassment. On May 26, 1998, a hearing was held on plaintiff's motion for a temporary restraining order in the O'Boyle case. At that hearing, Judge Zinora Rankin denied plaintiff's motion for a temporary restraining order and dismissed plaintiff's complaint with prejudice" — "Since the instant complaint is virtually identical to the complaint which was dismissed with prejudice in Johnson v. O'Boyle, C.A. 98-3875, plaintiff's claim in this case is barred by the doctrine of issue preclusion, collateral estoppel and res judicata. *Johnson v. Fairfax Village Condo.* IV 641 A.2d 495, 503 (D.C.App. 1994)"—Memorandum of Points & Authorities in Support of Defendant's Motion to Dismiss, or, in the alternative, for Summary Judgment, Exhibit Volume 2 of 3, at page 313–314.

Here attorney James A. DeVita is telling Judge Wendell P. Gardner, that he is precluded from hearing Johnson's claims against the District of Columbia, because Johnson's claims have already been heard by another Judge, Judge Zinora Rankin. It was a complete lie: Judge Zinora Rankin never heard, nor did she decide Johnson's claims for the deprivation of his 14th Amendment rights, the 1997 arrest, prosecution, and closing down of Johnson's business on May 17, 1997.

Attorney Tony S. Lee read the pleadings filed by the District of Columbia's attorney James A. DeVita, which state:

"Plaintiff's common law claims for false arrest and police harassment must be dismissed or summary judgment granted due to plaintiff's failure to provide the District of Columbia with notice of his claim within six months of the date upon which he suffered injury. D.C. Code Section 12-309 (1995 Reply. Volume). District of Columbia Code Section 12-309 provides:

> An action may not be maintained against the District of Columbia for unliquidated damages to person or property unless, within six months after the injury or damage was sustained, the claimant, his agent, or attorney has given notice in writing to the Mayor of the District of Columbia of the approximate time, place, and circumstances of the injury or damage. A report in writing by the Metropolitan Police Department, in regular course of duty, is sufficient notice under this section.

The purpose of this notice requirement is to ensure that District of Columbia officials are given prompt notice of claims for potentially large sums of money so that they can 1) quickly investigate before evidence becomes lost or witnesses unavailable; 2) correct hazardous or potentially hazaradous conditions and 3) settle meritorious claims. *Gwinn v. District of Columbia*, 434 A.2d 1376, 1378 (D.C. 1981) This notice requirement is mandatory and if there is no timely written notice, plaintiff is precluded from litigating his claim. Id."—Exhibit Volume 2 of 3, at page 315.

Attorney Tony S. Lee knew that the District of Columbia's attorney James A. DeVita applied the 12-309 notice requirements exclusively to "common law claims for false arrest and police harassment" leaving Johnson's claims of racial discrimination, deprivation of Johnson's federal constitutional rights under the 14th Amendment, and other claims for the violations of Johnson's federally guaranteed civil rights completely untouched by D.C. Code 12-309. Moreover, Tony Lee read *Brown v. United States*, 239 U.S.App.D.C.345, 356-357 (en banc): "We hold that appellant's noncompliance with 12 D.C. Code § 309 cannot bar his federal claims". Johnson's claims were raised in the context of violations of federal law.

The Superior Court's Order states: "Upon consideration of defendant District of Columbia's unopposed motion to dismiss plaintiff's complaint, the record herein, it is ORDERED, that the defendant's motion is GRANTED this 15th Day of July 15th 1998, Judge Wendell P. Gardner"—Exhibit Volume 2 of 3, at page 317.

Attorney Tony S. Lee read the criminal trial transcripts, which state in pertinent parts, "Now, *Harris* says the Government must prove first that acts take place on the premises that disturb the public or constitute a nuisance per se. And nuisance per se is to find as in the nature of a gambling house or a bawdy-house. The acts that either disturb the public or constitute a nuisance per se must be acts that take place on the premises. And I find that that requires the Court to make a

clear distinction between activities that occurred inside the Taj Mahal and those that occurred out on the street.... It is not and was not during the period in which this offense was allegedly committed the responsibility of Mr. Johnson or of any other private citizen to police the neighborhood of the Taj Mahal Club. It was the responsibility of the Metropolitan Police Department to do that. Their utter failure to perform that responsibility does not transfer the blame to Mr. Johnson. Mr. Johnson had no authority to police that area and would have subjected himself to great risk had he even attempted to do so.... Now, what took place inside the premises? Up to five hundred young people, perhaps as many as three hundred at any one time occupied these premises and listened to music of the type that they happened to enjoy and danced. They were searched before they went in. On four occasions when officers entered the club – well, on those four occasions there was only one time that any officer saw any illegal activity, and that was the occasion when a juvenile came out of the restroom smoking a marijuana cigarette. Even that activity, the juvenile apparently thought it necessary to go hide in the restroom rather than commit it out openly in the larger room. The undercover officer saw no illegal activity. Detective Haggerty saw no illegal activity. No one saw any illegal activity during the four times that the police entered this club other than that one marijuana cigarette.... In the Court's view that is a rather petty yield for all the efforts that the Government or the police department put into its efforts to build a case against the Taj Mahal Club. It hardly is

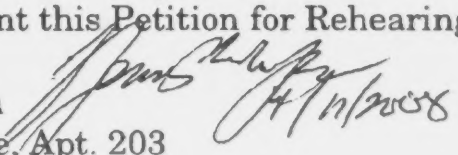
enough to say that the club was regularly resorted to for the commission of thee acts. It was regularly resorted to listen to music and to dance. And as a defense has contended there is nothing unlawful about that activity.... I've not in four, five – – four days of trial heard of a single instance in which a police presence was effected during the hours of operation of this club. The police were much more interested in trying to patch together a case for closing down the club than they were in preventing the activity of which the Government now complains.... That's also why the dam analogy that the Government makes, doesn't work. There was water that came through that dam and did damage. But there is nothing that came out of this club and did damage.... In any event, the Court believes that it erred in denying the defense's motion for judgment of acquittal at the end of the Government's case and it grants that motion at this time. Parties may be excused."—[Exhibit Volume 2 — 368-377]. Kenneth W. Johnson's testimony:

"THE COURT: When did you first provide a signed Form 180B to an officer to be submitted up through the chain of command? THE WITNESS: It would have been back in January. THE COURT: Of what year? THE WITNESS: It would have been back in January. THE COURT: Of what year? THE WITNESS: '96. THE COURT: So from January through all of '96 and the first five months of '97, you were not able to get a single application approved? That's correct, Your Honor." —[Exhibit Volume 1 at 217— See 207-221].

"THE COURT: I have a question, but I will not ask if either side wishes that I not and that is what was the Chief's response to Mr. Johnson's letter? THE COURT: Let me see it, sir. The letter states the Department's currently reviewing the practice of off-duty officers working at establishments with an ABC or a public hall license. Until a final decision has been rendered the request is denied." —221 See also [Exhibit Volume 2 — 371]: "the third element set out by *Harris* that the proprietor knows or should know of the acts and does nothing to prevent them."

CONCLUSION

Johnson asks the Supreme Court of the United States to grant this Petition for Rehearing.



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